injunction of the challenged state law "denied each branch of Nebraska's government any role in the interpretation or enforcement of the statute"). In short, "when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

C. When a Statute Does Not Discriminate Against Interstate Commerce, Facial Attacks Alleging Overbreadth Should Not Be Permitted.

When a statute is neutral toward interstate commerce, facial attacks alleging overbreadth should not be allowed. In such a situation, there is no need to apply heightened scrutiny and there is no question about the ability of the State to legislate. Consequently, there is no need to depart from the normal rules for facial challenges. If a litigant wishes to invalidate such a neutral statute on its face, then the litigant ought to have to demonstrate that the statute is unconstitutional in all of its applications. The fact that it is unconstitutional in some or even many applications is irrelevant.

Thus, if Yamaha wishes to have the federal courts find the Second Paragraph of *Virginia Code* § 46.2-1993.67(5) unconstitutional in every conceivable application, Yamaha should be required to show that this provision is in fact unconstitutional in every conceivable application. The mere fact that the statute might be unconstitutional as applied to a situation where a dealer in one corner of the State challenges the establishment of a dealership in another corner of the State is insufficient to invalidate the statute in all respects.

This Court has already agreed to decide if facial challenges alleging overbreadth are permitted in the context of abortion statutes. *See Ayotte v. Planned Parenthood, certiorari granted*, 125 S. Ct. 2294 (2005). This Court should also decide if facial challenges alleging overbreadth are permitted in the Dormant Commerce Clause context when the statute at issue does not discriminate against interstate commerce on its face or in its practical effect.

III. THERE IS NO ALTERNATIVE GROUND ON WHICH TO AFFIRM THE FOURTH CIRCUIT'S DECISION.

Although both the district court and the court of appeals correctly concluded that the statute at issue does not discriminate on its face or in its practical effect, Yamaha insists, "the judgment of the Fourth Circuit is independently supported by additional grounds." *Resp. Br. in Op.* at 18. Yamaha appears to contend that this Court could affirm the Fourth Circuit by deciding that the Second Paragraph discriminated in its effect, a decision contrary to those of both the district and circuit courts. Quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984), Yamaha states that the Second Paragraph "effects the same kind of 'simple economic protectionism' that this Court has routinely invalidated." In *Bacchus*, this Court addressed a wholesale excise liquor tax exemption under Hawaii law for locally produced liquor – in other words, a law that discriminates on its face. *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989), upon which Yamaha similarly relies, involves a Connecticut law that also discriminated on its face against interstate commerce. *See Id.* at 340-41. Yamaha's reliance on *Bacchus* and *Healy* illustrates how Yamaha's argument misses the point. Whereas regulation

that discriminates on its face or in its practical effect faces heightened scrutiny under the virtually *per se* invalidity standard, this Petition seeks review of whether the *Pike* balancing test should continue to be applied to statutes that are neutral towards interstate commerce. Dicta in cases involving statutes that discriminate on their face should not factor into this Court's consideration of the Commissioner's Petition since the Second Paragraph is neutral towards interstate commerce.

CONCLUSION

For the reasons stated above and in the Petition, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

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